State of Michigan
In the Supreme Court
Appeal from the Michigan Court of Appeal

Theresa O'Day DeRose (aka Theresa Seymour)
Plaintiff/ Third Party Defendant-Appellee,
v.

Joseph Allen DeRose,
Defendant-Appellee,
v.

Catherine DeRose,

Third Party Plaintiff-Appellant

Supreme Ct. 121246
Ct. of Appeals. 232780
Trial Court. 97-734836-DM

This Appeal Involves a Ruling that a Provision of The Constitution, a Statute Rule or Regulation or Other State Governmental Action is Invalid

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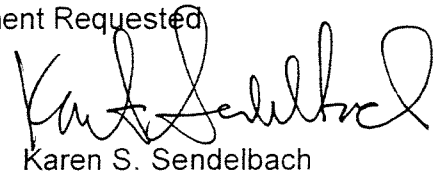
Oral Argument Requested



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This brief reflects the position of the majority of the Family Law Section of the State Bar of Michigan, taken in accordance with its bylaws regarding the following identified matters. The position taken does not necessarily represent the policy position of the State Bar of Michigan. These matters are within the jurisdiction of the Family Law Section.

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Basis of Jurisdiction of the Supreme Court

The Supreme Court has accepted jurisdiction of this case and invited amicus briefs in its order of October 8, 2002.

Statement of Questions Involved

A. Whether the Court of Appeals correctly found Michigan's "grandparent visitation" statute, MCR 722.27(b) unconstitutional after *Troxel v. Granville.*

Plaintiff/Third party Defendant-Appellee:	Yes
Defendant:	Did not Participate
Majority of Family Law Council of State Bar of Michigan	Yes
Minority of Family Law Council of State Bar of Michigan:	No
Third-Party Plaintiff-Appellant:	No
Court of Appeals:	Yes
Trial Court:	Yes

B. Whether the Court of Appeals correctly held that application of an evidentiary standard (in this case, "clear and convincing evidence") is insufficient to provide the required deference to the natural parent's decision required for Constitutionality pursuant to *Troxel.*

Plaintiff/Third party Defendant-Appellee:	Yes
Defendant:	Did not participate
Majority of Family Law Council of State Bar of Michigan	Yes
Minority of Family Law Council of State Bar of Michigan:	No

Third-Party Plaintiff-Appellant:	No
Court of Appeals:	Yes
Trial Court:	Yes

C. Whether the Court of Appeals correctly held that the lack of standards in the broad "best interests of the child" standard encompassed in MCR 722.27(b) render it unconstitutional pursuant to *Troxel*.

Plaintiff/Third party Defendant-Appellee:	Yes
Defendant:	Did not participate
Majority of Family Law Council of State Bar of Michigan	Yes
Minority of Family Law Council of State Bar of Michigan:	No
Third-Party Plaintiff-Appellant:	No
Court of Appeals:	Yes
Trial Court:	Yes

Statement of Facts

This amicus accepts the statement of facts made by the Court of Appeals in its decision. *See DeRose v. DeRose*, 249 Mich App 388, 643 NW2d 259 (2002).

The Court of Appeals found that:

> Plaintiff and Defendant were divorced after Defendant admitted abusing Plaintiff's daughter from a previous marriage (Defendant's stepdaughter). Plaintiff and Defendant did have a child in common, a daughter named Shaun Ashleigh (born April 1, 1996). The judgment of divorce granted plaintiff sole legal and physical custody of Shaun. While the action was pending, defendant's mother, third party plaintiff DeRose, filed a petition for grandparent visitation with Shaun. Plaintiff opposed the request, citing DeRose's denial of her son's abuse of plaintiff's other daughter and alleging that it was not in Shaun's best interest to have visitation with DeRose[1]. *DeRose,* 389.

The trial court subsequently substituted its judgment for the child's mother and sole legal and physical custodian, finding merely that:

> ... it doesn't strike me that there is any reason here that a child should be deprived of a grandmother. Grandmothers are very important. Grandmothers are very important. [*sic.]* I don't say that just because I am one, but I do believe they are important. I have a niece who doesn't have any and she borrows grandparents and I realize this is difficult, a very difficult time for the 12 year old. . . *DeRose,* 390.

The trial court thus awarded grandparent visitation pursuant to MCR 722.27(b) despite the mother's protest. The custodial mother appealed to the

[1] This Court should note, although not noted in the Court of Appeals decision, that Defendant pled guilty to first degree criminal sexual conduct against his 12 year old live-in stepdaughter and was sentenced to 12 – 20 years in prison, and additionally was ordered to have no contact with any minor children if allowed parole. May 27, 2000 hearing transcript, page 4. The grandmother in this matter admitted that she had no previous relationship with the child since she was 1 year old, and that she did not believe that her son had committed the molestation to which he pled guilty. Family Counseling and Mediation Report, October 26, 1998).

Court of Appeals, who reversed the trial court's decision and found MCR 722.27(b) unconstitutional pursuant to *Troxel*. The grandmother then asked this Court to review the issue.

Law and Argument

Introduction

Procedural:

The Family Law Section of the State Bar of Michigan has considered the issues regarding grandparent visitation raised in *DeRose*, andvoted to take a position and offer an amicus brief representing our views. The Family Law Section represents over 2500 family law attorneys in Michigan. The vote was 2/3 in favor of this position, and 1/3 in favor of a different position, so in the spirit of offering the Court the maximum number of legal opinions, the Section voted to provide the Court with a majority and minority amicus brief.

Substantive:

When considering "grandparent visitation," one's mind normally turns to a Normal Rockwell picture of a loving grandparent doting on his or her grandchild, with the smell of oatmeal cookies baking in the background and perhaps the family dog nearby. At first blush, grandparent visitation appears wonderful and important, not objectionable. However, this Court should keep in mind not only the Constitutional implications of grandparent visitation, which will be fully discussed later in this brief, but also the factual reality of litigated grandparent visitation cases:

> Although many grandparents might ideally like more involvement with their grandchildren, very few grandparents will ever go to court against their

> own children to seek visitation. While grandparent visitation sounds innocent and even desirable, the reality is that the vast majority of grandparent visitation cases involve dysfunctional and high conflict families. Giving them visitation is likely to only put more stress on the children. Rather than encouraging such claims, we should be highly suspicious of them.
>
> Zorza, J. "*PKPA Amendment Requires Involvement of Grandparents in All Custody Disputes*," Domestic Violence Report, Vol. 4 No. 4 , p. 61-62 (April/May 1999).

Far from promoting the "Normal Rockwell" family picture described above, the option for court-ordered grandparent visitation, against the wishes of the fit parent, can do much to add to the destruction of a family. When a court orders visitation that parents do not welcome, "ill feelings, bitterness and animosity" between the parents and grandparent may intensify, affecting the children. *Strouse v Olsen*, 397 NW2d 651, 655 (S D., 1986). Parents are forced to defend their fundamental decisions regarding the upbringing of their own children, and forced to litigate their personal, private and subjective decisions concerning their child. The addition of third parties to a divorce proceeding increases the financial and emotional costs of the proceedings, prolonging the agony of divorce for the children as well as the drain of financial resources away from the children. Both the *Troxel* main opinion, and Justice Kennedy's dissent, point out that third party litigation itself, with all of its emotional and financial costs, can be an infringement of the fundamental rights of fit parent and child.

In the instant case, the trial court judge substituted her judgment about what type of associations are best for a child, contrary to the parent's decision. The judge did this despite the fact that the natural parent was at all times considered a fit parent. As the Court of Appeals found, this was inappropriate

and a violation of the parent's Constitutional rights. Even the concept of *parens patriae* is not applicable unless parents have acted in a way which falls below certain minimum standards of fitness (creating a situation which causes harm to a child). The oldest and most fundamental constitutional liberty interest is at issue in this case: the interest of parents in the care, custody, and control of their children free from intrusion by the state or any third person. All natural (including adoptive) parents, whether part of a two-parent family, divorced, or single parents, have this right.

This liberty interest ensures the central premise that care, custody and control of children by the natural parents is presumed to be in the best interests of children, or, in other words, that fit parents have the sole right to be the arbiter of what is in their child's best interests free of state interference and review. The state should intervene only when there are two fit parents who disagree (and thus have competing Constitutional rights to make decisions for their child) or when the Court has found unfitness in the parent.

The state has a duty to ensure that all parents act within a minimal "objective" standard of fitness that ensures the physiological safety of the child. The state, however, does not have a right, in the face of the constitutionally protected parent-child relationship, to interfere in decisions that do not relate to parental fitness. Parents should not lose their right to parent their children, or to have their fundamental decisions about their children reviewed by the government, when their care does not fall below certain minimal standards of behavior. See *Troxel.*

> Third person (non-parent) rights to custody are legislatively created. These legislative creations cannot compete against the constitutionally protected parent-child liberty interest that "derives from blood relationship, state-law sanction, and basic human rights..." *Smith v Organization of Foster Families (OFFER)*, 431 US 816, 846 (1977). In fact, U.S. Supreme Court Justice Sandra Day O'Connor has described this constitutional protection as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *See Troxel.*

This brief will address the serious constitutional, societal, and policy issues raised by allowing the state to order visitation with grandparents against the wishes of the child's fit parents. Specifically, this brief will urge that the Michigan grandparent visitation statute which gives the courts that authority, MCR 772.27b, is facially unconstitutional after the *Troxel* decision. The mere imposition of an evidentiary standard ("clear and convincing evidence") prior to consideration of the best interests factors is insufficient to provide the necessary deference to the decision of the fit parent required to allow the statute to survive a constitutional challenge pursuant to *Troxel.* Additionally, the "best interests" standard applied by the Court in these matters are insufficiently subjective to protect "perhaps the oldest of the fundamental liberty interests recognized by this Court [the U.S. Supreme Court]." *See Troxel.*

A brief history of grandparent visitation laws:

All grandparent visitation rights are legislatively created, most in the 1970s and 1980s. In common law, no third parties, including grandparents, had any right to visit or communicate with a child if the parent objected to the interaction. This was based in the recognition that parents have a constitutionally protected right to determine their child's companionship, care, custody and management.

See generally Schoonmaker, Narwold, Hatch & Goldthwaite, *Constitutional Issues raised by Third-Party Access to Children*, 25 Fam. L.Q. 95 (Spring 1991). This right is derived from the 5th and 14th amendments to the United States Constitution, which proscribe governmental interference with individual "liberty." *E.g., Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); *Lassiter v. Department of Social Services of Durham County*, 452 US 18 (1981).

Despite the explosion of grandparent visitation statutes nationwide in the 1980s, the late 1990s saw a proportionate restriction of those laws: many cases found grandparents and other third party visitation statutes an unconstitutional infringement on a parent's right to raise their children as they saw fit. *E.g. Castagno v.Wholean*, 684 A2d 1181 (Conn. 1996); *Beagle v. Beagle*, 678 So. 2d 1271 (FLA 1996); *Brooks v. Parkerson*, 454 SE2d 769 (Ga 1995); *Olson v. Olson*, 518 NW 2d 65 (Minn. Ct. App. 1994); *Hawk v. Hawk*, 855 SW2d 573 (Tenn. 1993). *See also In Re Emanual S. v. Joseph E.*, 560 NYS 2d 211 (App. Div 1990) (grandparent visitation is appropriate only in "extraordinary" circumstances); *Williams v. Williams*, 485 S.E. 2d 651, 652 (Va. Ct. App. 1997) (imposing preliminary requirement showing of harm or threat of harm to child before visitation may be granted). *See generally* Bohl, Joan C, *Current Trends in Grandparent Visitation Law,* Wiley Family Law Update 1-28 (1998).

> These cases were predicated upon the principle that when parents together were united in their opposition to grandparent visitation, either in an intact family or as divorced parents united in their resolve, or when a surviving parent opposed grandparent visitation, a mere finding that

visitation is in the best interests of the child is insufficient to overcome the constitutional rights afforded to the parent.

Excerpted from Morgan, Laura A., *Grandparent Visitation Post-Troxel,* Family Law Reader, October 2001.

The United States Supreme Court heard the conflicting arguments regarding third party visitation with children on June 5, 2000 when it heard *Troxel*, more fully described below.

1. **The natural parent-child relationship is protected by constitutional liberty and privacy rights and the application of the strict scrutiny test, from intrusions by third persons. Fit parents have the sole right to determine, without governmental review, what is in the best interests of their children when the conflict is between the fit parent and a third party.**

Any third-party interference with the parent-child relationship is subject to review in light of the constitutionally protected liberty interest between natural (including adoptive) parents and children.

Cases involving state intrusion into the parent-child relationship are subject to a strict scrutiny analysis. This Court has noted its "historical recognition that freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky*. "[T]he Fourteenth Amendment forbids the government to infringe fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v Gluckberg*, 521 US 702, 721 (1997) (citing *Reno v Flores*, 507 US 292, 302 (1993)).

"Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this

Nation's history and tradition." *Moore v City of East Cleveland*, 431 US 494, 503 (1977). The Constitution prohibits any intrusion into the parent-child relationship absent established substantive and procedural due process protections; specifically, a requirement of a finding of unfitness in appropriate proceedings as a prerequisite to intervention.

The Michigan grandparent visitation statute is unconstitutional because it invades the parent-child relationship without sufficient substantive and due-process protections; it merely places the burden on the grandparent to prove their case by "clear and convincing evidence." This evidentiary burden is insufficient to meet the standard required to invade a parent's fundamental liberty interest in raising their children free of governmental influence.

A. Fundamental liberty interests exist between a fit parent and their child which must be protected by Michigan's law.

The United States Supreme Court, in *Troxel*, summarized the liberty interest of parents in the care, custody, and control of their children as follows:

> The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923),* we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925),* we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *268 U.S. at 535.* We returned to the subject in *Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438*

(1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *321 U.S. at 166.*

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g.*, *Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)* ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)); *Wisconsin v. Yoder, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)* ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978)* ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R., 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979)* ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky*(discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg*, *supra*, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

The United States Supreme Court in *Troxel* found that Washington's third party visitation statute violated the constitutional rights of the parties in that it gave the state inappropriate authority to override the decisions of fit parents.

Michigan courts have also held that the care, custody and control of one's children comprise a fundamental natural and constitutional right. *In re Clausen,* 443 Mich 1204, 505 NW2d 575 (1993), *In the Matter of Laflure*, 48 Mich App 377, 385, 210 NW2d 482, lv den 380 Mich 814 (1973)(right to the custody of his or her children is an element of the "liberty" guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States).

In *Stanley*, the U.S. Supreme Court emphasized the paramount importance of the natural parent-child relationship:

> [T]he rights to conceive and to raise one's children have been deemed essential ... basic civil rights of man... and [r]ights far more precious ... than property rights. ... It is cardinal with us that the custody, care, and nurture of the child reside first in the parents. ... The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, ... the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment ... (citations omitted).

See also *Santosky*, quoting *Stanley*, (the companionship, care, custody, and management of one's children identified as "far more precious than any property right").

The Fourteenth Amendment applies where there is "state action." A state court custody decision constitutes state action for purposes of the Fourteenth Amendment of the United States Constitution. See *Palmore v Sidoti*, 466 US 429, 432 n.1 (1983)(custody decision). The state acts through the use of its courts and judiciary. *Shelly v Kraemer*, 334 US 1, 14 (1948); *Ex parte Virginia*, 100 US 339, 346-347 (1880). Thus, the constitutionally mandated protections of the natural parent-child relationship apply to parental termination proceedings (where the state acts as "prosecutor"), as well as to custody proceedings.

In *Smith,* the U.S. Supreme Court stated that the parent –child relationship is recognized and protected under the Constitution:

> The individual's freedom to marry and reproduce is 'older' than the Bill of Rights ... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in the intrinsic human rights, as they have been understood in 'this Nation's history and

connections greater to the children than most grandparents; they had acted as parents to the children, and had custody of the children for some time. The U.S. Supreme Court refused to acknowledge the claimed "liberty interests" of the foster parents:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like associations into which they have freely entered, even without biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic-human rights...

Smith, 846. The high Court recognized that foster families develop a relationship with children, but specifically found that they have no rights as against the natural child-parent relationship and refused to permit the state-created interests of the third parties, the foster parents, to rise to the level requiring the same due process rights guaranteed to natural parents.

The Michigan case of *In re Clausen,* reaffirmed these constitutional principles in an emotionally charged, nationally debated custody case. The Michigan Supreme Court did not balance the claimed interests of the third person petitioners against the natural parents. Instead, the Court applied constitutional protections only to the natural parent-child relationship, recognizing the "mutual due process liberty interest" between natural parent and child. *Clausen*, fn. 46.

The court specifically rejected an attempt by the third party custodians who "maintain[ed] that there is a protected liberty interest in their relationship with the child, which gives them standing...".

> We reject these arguments. ... It is not enough that a person assert to be a "contestant" or "claim" a right to custody with respect to a child. If that

were so, then any person could obtain standing by simply asserting a claim to custody, whether there was any legal basis for doing so or not. The Court of Appeals has correctly read our decision in *Bowie* as requiring the existence of some substantive right to custody of the child. We adhere to the holding of *Bowie* that a third party does not obtain such a substantive right by virtue of the child's having resided with the third party. Id. at 682.(emphasis added).

The court stated that the United States Supreme Court cases relied upon by the third parties in *Clausen*

> ... do not establish that they have a federal constitutional right to seek custody of the child. ... While some of those cases place limits on the rights of natural parents, particularly unwed fathers, they involve litigation pitting one natural parent against the other, in which, almost of necessity, one natural parent must be denied rights that otherwise would have been protected ... Id. at 683-684 (discussing, among other cases, *Quillon v Walcott*, 434 US 246 (1978)).
>
> The rights of natural parent and child do not diverge *unless there is a finding of unfitness or unless the parent has voluntarily terminated parental rights in an appropriate proceeding with all attendant due process protections*. See note 5, infra. The Michigan Supreme Court repeatedly stated in *Clausen* that:
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> While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit.
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> * * *
>
> *The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness*. As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child. *Clausen,* 687 (emphasis added).

In the instant case, where the grandparent seeks only visitation, not custody, her rights are not greater than in *Bowie* or *Clausen.*

The fundamental right to family integrity does not belong to the parent alone, but also to the child. The right "extends to a mother and her natural

offspring." *Duchesne v Sugerman*, 566 F.2d 817, 825 (2nd Cir. 1977). The natural parent and child are identified as one, absent unfitness. Familial rights are relationship rights between parent and child and are "not the individual interests of either parent or child." Bohl, Joan, "'*The Unprecedented Intrusion': A Survey and Analysis of Selected Grandparent Visitation Cases*," 49 Okla L. Rev. 29, p. 46 (Spring 1996). The rights of fit parent and child are not in competition, and are not balanced against each other.

The sanctity of the parent-child relationship is based on more than our Constitution. It is premised on natural law, on blood relation, and on the most deeply rooted concepts of familial ties, responsibility, and belonging. This relationship must not be subordinate to legislative mandates. Grandparents, even if they be the subject of a Norman Rockwell painting, do not possess Constitutional rights to usurp a fit parent's decision making.

The simple fact of previous divorce action does not give a trial court the authority to overcome the fundamental liberty interest between parent and child. The issues of a pending action or standing were irrelevant in *Troxel*, where the focus was on the constitutional weight of the parental presumption and findings of parental unfitness.

There are no inherent rights to visitation with grandparents which exist in either the grandparent or the grandchild. The overall decision in *Troxel* is that if parents are capable (i.e. fit) to make decisions concerning the rearing of their children, they, not the State, make the decision about grandparent or third-

person association. Both *Troxel* and *Clausen* specifically recognize that there is no Constitutional right to third person (including grandparent) visitation.

The Michigan Supreme Court has agreed with the *Troxel* reasoning: it denied a grandparent equal protection claim on the basis that grandparents are not a protected class and grandparent visitation is not a protected interest. *Frame v Nehls*, 452 Mich 171 (1996).

Any rights grandparents or other third persons have are legislatively created. As discussed below, these legislative creations cannot override the mutual liberty, privacy, and associational interests between parent and child in the absence of a compelling state interest. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)(discussing parental choices and right of association, citing *Boddie*, 401 U.S. 371 (1970)); *Lulay v Lulay*, 739 NE2d 521 (2000)(primary parental importance of right of association).

In *Troxel*, the United States Supreme Court affirmed that the State of Washington's third-party (i.e. non-parent) visitation statute was unconstitutional. The statute allowed trial courts to award visitation to any person, regardless of whether there is a pending custody action, whenever it may serve the "best interest of the child." What was at issue was the scope of the state's authority, specifically, the authority of the trial court (the State) to award visitation contrary to the determination of a fit parent:

> First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. [Citation omitted]. Second, by allowing "'any person' to petition for forced visitation of a child at 'any time' with only the requirement being that the

> visitation serve the best interest of the child," the Washington statute sweeps too broadly. [Citation omitted]. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a "better" decision." *Troxel*, 2058-2059 (discussing Washington Supreme Court decision)(Emphasis added).

The Washington Supreme Court found that parents have a right to limit their children's contact with third parties, and that between parents and judges, it is the parents who have the right to make these decisions. That court found the state's third-party visitation statute unconstitutional on its face.

The United States Supreme Court likewise focused on the role of the state in substituting its judgment for that of fit parents and on the inappropriateness of employing the best interest standard:

> "[S]o long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Majority Opinion, O'Conner, 2060.
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> ***
>
> "The [trial] judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children.
>
> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child ..." Majority Opinion, O'Conner, J., 2062.

Troxel concluded that the case was nothing more than a disagreement between the trial court and the mother over her children's best interests. The Court found the statute violated due process based on its grant of "broad, unlimited power " to

the trial court to substitute its judgment for that of fit parents determined only by what it considers is in the best interest of the children. *Troxel.*

Justice Souter, in his concurring opinion, reiterated that the use of the substantive best interest standard was inappropriate, stating that the statute allows any third person to receive visitation "subject only to a free-ranging best-interests-of a child standard." *Id.* at 2066. Justice Thomas would bar all states from "second-guessing a fit parent's decision regarding visitation with third parties" and would apply strict scrutiny to all such statutes implicating parental rights. *Id.* at 2068. As for the dissenters, Justice Scalia personally agreed that parental rights should control, however, he felt that the Constitution did not give the Court authorization to strike down the state law. Justice Kennedy agreed that custodial parents have constitutional rights to determine how to raise their children without undue influence from the state, however, parents do not have absolute veto power. Justice Stevens was the only justice to fully favor the third persons/grandparents.

2. The Court of Appeals correctly found Michigan's "grandparent visitation" statute, MCR 722.27(b) unconstitutional after *Troxel.*

A. The *Troxel* requirements for a grandparent visitation statute to be Constitutional.

In *Troxel*, the United States Supreme Court declared that parents have "perhaps the oldest of the fundamental liberty interests recognized by this Court," i.e. the right to determine the care, custody, and control (including the

associations) of their children. *Id.* Children share in this due process liberty interest with their parents.

In *Clausen*, this Court specifically recognized the "mutual due process liberty interest" between natural parent[2] and child, stating:

> The ***mutual*** rights of the parent and child come into conflict only when there is a showing of parental unfitness. *As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing*, sometimes despite the preferences of the child. *Clausen*, 687; fn. 46 (Emphasis added).

Troxel articulates the Constitutional tenet that fit parents know what is best for their own children and are in the best position to make decisions which promote and protect their children's interests free from State intrusion.[3] *Id*, at 68.

Troxel did not find any other grandparent or third-party visitation statute constitutional; no other statute from Michigan or any other state was before the Court.[4] These statutes are susceptible to constitutional scrutiny on the basis that they may "contravene the traditional presumption that a fit parent will act in the

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[2] A natural parent includes biological or adoptive parents. Third persons are any individuals other than natural parents. *See* MCL 722.22(c).

[3] The law presumes that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, the law historically has recognized the natural bonds of affection and blood relation that lead parents to act in the best interests of their children.

[4] "[The *Troxel* opinion] is likely to be cited in challenges to similar statutes across the nation. Between 1966 and 1986, all 50 states passed grandparent visitation laws that were sponsored by the American Association of Retired Persons ...

> While differing in details, all the laws but Georgia's authorize visitation orders if a judge thinks it would be in the best interest of the child." Savage, David, "Parents First," 38.

best interest of his or her child." Savage, David, *Parents First*, ABA Journal (August 2000), quoting *Troxel*. As Justice O'Conner wrote for the majority:

> The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. ..[O]ur terminology is intended to highlight the fact that these statutes can present questions of constitutional import.
>
> The constitutionality of any statutory standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Troxel*, 73.

Unfortunately, the U.S. Supreme Court did not provide an identifiable list of factors necessary for a grandparent visitation statute to be constitutional. What the Court did clearly hold was that the statute (1) must give "special consideration" or deference to the parent's decision; and (2) the statute must not be overbroad. Appellant appears to urge this Court to adopt and apply the dissents of *Troxel* to the Michigan statute.

B. Regardless of the Standard of Evidence Required, Application of the "Best Interests" standard is Inappropriate in a Grandparent Visitation Issue and does not provide any deference to a parent's decision

The best interests test is inappropriate in a grandparent visitation case because it is inherently subjective, and a legal analysis which compromises a party's fundamental constitutional right should be based on an objective standard.

Troxel is important not because it states who has the burden of proof in a grandparent visitation dispute: instead, the Court discussed the substantive

standard used to determine when the State can review (and overturn) a fit parent's decision regarding their children's best interests:

> First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, *for there is a presumption that fit parents act in the best interests of their children.*" (Emphasis added). *Troxel,* 68.

The primary protection of the natural parent-child liberty interest is that parental custody or decision-making may not be disturbed by the state absent a showing that the parent is unfit (the state may not review and overturn a parent's decision about their child's best interests absent an unfitness standard). The United States Supreme Court has held that a state may exercise its parens patriae power only when there is harm or threat of harm to the child.

Likewise, this Court in *Clausen*, discussed a long line of custody cases where the rights of natural parents were not disturbed in the absence of findings of unfitness, sometimes despite the preferences of the child. *Clausen,681* - 687, citing *Burkhardt v Burkhardt*, 286 Mich 526, 282 NW 231 (1938); *Liebert v Derse*, 309 Mich 495, 15 NW2d 720 (1944); *Riemersma v Riemersma*, 311 Mich 452, 18 NW2d 891 (1945); *Herbstman v Shiftan*, 363 Mich 64, 108 NW2d 869 (1961).

The "free-ranging" best interest test criticized by Justice Souter in *Troxel* and applied by the Michigan courts ignores the fundamental issue of whether parents are unfit or incapable of making decisions that are best for their children and does not address the specific relationship between parent and child nor provide any deference to the decision of the parent. *See* MCL 722.23 (Michigan's best interests factors for child custody). Instead, MCL 722.23 provides broad

scope for a judge to overrule a parental decision based on subjective comparison and insert his or her own view as to what is best[5]:

> "As we have explained, the due process clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a "better" decision could be made." *Troxel*, Majority, 120 S.Ct. at 2064.

A comparative best interest test has historically been used in divorce proceedings between competing parents who have the same Constitutional rights with respect to each other. MCL 722.25. However, a court's authority to decide between parents, who both have equivalent and inherent Constitutional rights to custody and visitation, does not extend to granting visitation to third parties, who have no such rights. Because they are designed to be applied to parents, the parties' (and children's) Constitutional rights are not addressed. A more objective fitness test focuses on the relationship between parent and child (and the appropriateness of a parent making decisions for a child) and is not a comparison with other proposed custodians or interveners

Appellant argues that the best interest factors are detailed and comprehensive and provide ample guidance for a court. However, the best interest factors are merely a list of broad areas of comparison. *See* MCL 722.23. While it is true that fitness determinations also incorporate the subjective determinations, they do so to a lesser degree than a comparative test. Given the fundamental nature of parental rights, a valid state grandparent visitation statute

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[5] Indeed, it is obvious that in the instant case, the judge precisely substituted her judgment that "grandmothers are important" for the mother's decision that it was not in her daughter's best interests to spend time with her paternal grandmother, mother of the man who abused her. This decision illustrates the fact that the statute requires no deference whatsoever to the decision of the parent before the judge decides what is in the best interest of their child.

must furnish the judge applying it with sufficient **objective** criteria to make reasonable decisions based on facts, not idiosyncratic choices based on undefined amorphous standards which allow a judge to overrule a fit parent's decision merely because he or she may have made a different decision for their child. *See Herbst v Swan*, Court of Appeal, California, Second Appellate District, Division Four, October 3, 2002 Cal. App. LEXIS 4736(visitation statute unconstitutionally applied).

> The best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding that it is a matter of deciding what kind of children and families, what kind of relationships – we want to have." Weaver-Catalana, Bernadette "*The Battle for Baby Jessica: A Conflict of Best Interests*," 43 Buffalo Law Review 583 (Fall 1995)

Wide discretion under the best interest factors raises the specter of cultural, class, life-style and other types of bias and prejudice and ultimately results in the very substitution of judgment condemned in *Troxel*.

One of the most important points of T*roxel* is the Constitutional presumption that fit parents make decisions that are in the best interest of their children. Best interest tests do not address this Constitutional presumption (whether a parent is capable of making decisions for their child) and instead allow state insertion of its judgment as to what is best, contravening *Troxel*.

C. The Michigan Grandparent Visitation statute is unconstitutionally broad.

The *Troxel* Court held that once of the reasons the Washington state

statute was Unconstitutional was that its "sweeping breadth" was overly broad:

Judge Souter, in his concurring opinion, held that:

> I see no error in the second reason, that because the state statute authorizes any person at any time to request (or a judge to award) visitation rights, subject only to the State's particular best interest standard, the Statute's statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections. (Souter concurring opinion, 2).

He continues:

> [T]his for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that it's' statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. (Souter Concurring opinion, 5.)

Michigan's statute suffers from the same unconstitutional infirmity: it allows any person to petition for parenting time once the parties file for divorce.

> § 722.27. Child custody disputes; powers of court; support order; enforcement of judgment or order.
>
> Sec. 7. (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b , the court may also order support as provided in this section for a child after he or she reaches 18 years of age. The court may require that support payments shall be made through the friend of the court, court clerk, or state disbursement unit.
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal **grandparents, or by others**, by general or specific terms and conditions. Parenting time of the child by the parents is governed by section 7a. (Emphasis added).

By allowing any person to petition for parenting time with the child, Michigan's "grandparent visitation" statute, MCL 722.27, suffers the same Constitutional infirmity of as the Washington statute and must similarly be struck down. Plaintiff-Appellant, in their brief, concede that the "any person at any time" statutes are unconstitutional; Michigan's "any person" at "any time after the Court has taken action in any form in the family" is similarly broad.

Michigan has another provision, MCL 722.27b, which states that there must be a "pending" custody dispute with respect to the child before grandparents may intervene. Sec. 27b also states that grandparents may ***initiate*** a visitation action concerning a grandchild if their own child has died, which is not the *Derose* situation. However, as discussed in this brief, permitting grandparents to seek visitation if their child has died, with no further limitations, also fails under *Troxel*.

Even if the statute limited grandparent visitation requests to grandparents of children whose parents had filed for divorce or separation, or requested a custody decision, the statute would be unconstitutional. In that case, the statute would provide grandparent visitation only to grandparents of divorced or deceased parents (even those who previously had no relationship with the child); not grandparents of intact families, for children born out of wedlock (who may have had extremely close relationships with the child). This limitation is illogical and fails to treat children or grandparents in similar situations similarly.

3. The Michigan statute's "clear and convincing" evidentiary standard and best interests standard do not protect individual fundamental

Constitutional rights sufficiently to allow the grandparent visitation statute to stand.

A. MCL 722.25, a "parental presumption" applies to custody, not parenting time, and does not save Michigan's grandparent statute, MCL 722.27(b) from being constitutionally infirm.

Michigan's grandparent visitation statute, MCL 722.27(b), includes no parental presumption as required by *Troxel.* The only "parental presumption" included in the custody act is encompassed in MCL 722.25, and does not (and has not been in the instant case) applied to grandparent visitation cases (the "parental presumption" in MCL 722.25 assumes that it is in the best interests of the child to be in the custody of a parent over a third party; it makes no mention of deference to the parent's decisions regarding the child and makes no reference to parenting time or visitation).

Even if it were to be applied to grandparent visitation cases, a presumption is insufficient to create the "special weight" on the parent's decision as required by *Troxel.* A presumption is not deference to a parent's decision, special weight to a parent's decision, or a heavier weight on a parent's decision. In the law, a presumption is merely a procedural construct which relieves a party of the duty to proffer initial evidence regarding an issue; it relieves them of the burden of going forward. Once the "presumption" is rebutted by any facts whatsoever, the parties are then on equal footing regarding the best interests factors. The presumption even if MCL 722.25 applied to grandparent visitation cases (which it does not) does not protect a constitutional right and does not provide any special weight; it is essentially a meaningless procedural tool.

B. "Clear and Convincing" evidence is merely an evidentiary standard which must be met during contemplation of the best interest standards and does not provide any deference to the parent's decision.

Troxel clearly states that, to reach Constitutional muster, the state must accord "special weight" to the fit parent's decision regarding grandparent visitation: "the problem here is not that the Washington Superior Court intervened but, that when it did so, it gave no special weight at all to *Granville's* determination of her daughter's best interest. *Troxel,* 67. Justice O'Connor continued, stating "...the decision whether such an inter-generational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Troxel,* 69.

Michigan's statute does not accord any "special weight" to the parent's own determination. It merely places the burden of proof with the grandparent (the requesting party) and holds them to a "clear and convincing" evidentiary standard in application of the best interests standard. The application of an evidentiary standard is insufficient to accord "special weight" and merely assists the Court in considering the application of the facts to the best interests factors. No burden, however high, prevents the inappropriate judicial review of a fit parent's decision about what they believe is in the best interests of their child.

Appellant argues that to satisfy *Troxel*, third party petitioners need only show "by clear and convincing evidence" that visitation is in the best interest of children pursuant to the recent case of *Heltzel v Heltzel*, 248 Mich App 1 (2001). The *Heltzel* decision relies on Sec. 25 of the Child Custody Act in applying clear and convincing evidence as the protection of the parent-child liberty interest. Sec. 25(1) of the Child Custody Act provides that:

> "If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence."

By its precise language, Sec. 25 applies only to custody disputes. This case involves visitation, not a request for custody, and Sec. 25 is this not applicable. Further, the *Heltzel* court's statement that "clear and convincing evidence" is a *substantive* test is clear legal error. This Court has specifically held that "contrary to a growing misconception ... we view the clear and convincing standard not as a decision-making standard, but as an evidentiary standard of proof that applies to all decisions..." (Emphasis added). *In re Martin*, 450 Mich 204, 219, n. 12, 538 NW2d 399 (1995)

C. The best interest test in cases between fit parents and third parties is essentially substituting the court's judgment for the best interests of the child for the parent's determination of the best interests of the child. This substitution of judgment is prohibited under *Troxel.*

In writing the plurality opinion, Justice O'Connor specifically states:

> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. . . In light of this extensive precedent, it

> cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Troxel.*

The U.S. Supreme Court specifically held that it was inappropriate for a judge to substitute his or her decision about what was best for a child for the fit parent's determination of the same issue. *Troxel,* majority, 120 ("As we have explained, the due process clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a "better" decision could be made.") Conversely, by adopting a subjective best interest standard which provides no deference to the decision of the fit parent, the Michigan statute requires a judge to substitute his or her judgment for that of the fit parent.

The Michigan statute differs in no significant way from the Washington statute found unconstitutional in *Troxel.* MCL 722.27 permits a trial court to award visitation to anyone based upon a simple best interests test. Citing *Troxel*, the *Derose* decision correctly emphasizes the fundamental right of parents to rear their children, noting that Washington's statute was "breathtakingly broad" and contained no requirement that the court accord the parent's decision any presumption of validity or weight.

In comparing Michigan's grand parenting provision, *Derose* found that while Michigan's statute did restrict grandparents to petitioning for visitation when a custody matter is otherwise before the court (and in cases of death), a judge is

still ultimately authorized to issue a visitation order whenever the judge "deems it to be in the best interests of the child."

> "Indeed the Michigan statute ***mandates*** the trial judge to issue such an order once the judge finds that grandparent visitation would be in the best interest of the child." Emphasis added.

This is simply tantamount to a trial court inserting its judgment of what would be a "better," without giving any appropriate weight to the constitutionally protected parent-child relationship. *See Herbst* (need for some objective criteria). The Court of Appeals in this case properly concluded that while the Michigan statute is narrower than Washington's in terms of standing to file a visitation action, the Michigan statute is no narrower once a petition is before a court, the fundamental consideration. "Simply put, if a judge in Washington cannot constitutionally be vested with the discretion to grant visitation to a non-parent based upon a finding that it is in the child's best interests to do so, then a judge in Michigan cannot be obligated under statute to do the same." *DeRose.*

D. The Pending Action "Requirement" Offers no Real Constitutional Protection

Limiting a third party's right to request visitation with a child to those circumstances when a child custody "dispute" is before a court is superficial at best and offers no protection of the parent-child liberty interest. As discussed, MCL 722.27(1) and 27b (1) provide that grandparents can intervene and seek visitation with their grandchildren "if a child custody dispute with respect to that child is pending before the court." (Emphasis added).

The Washington statute before the United States Supreme Court in Troxel similarly referenced pending actions; however, this was of no import in the

Supreme Court's constitutional analysis relating to parental unfitness or the inappropriateness of the state injecting its own judgment over the parent's judgment. Divorcing parents are not unfit or less capable of making associational decisions on the behalf of their children. Constitutional protections are not limited to two parent families. *Rust v Rust*, 846 SW2d 52, 56 (Tenn. Ct. App 1993) (single-parent family unit entitled to similar measure of constitutional protection against unwarranted governmental intrusion as accorded intact two-parent family).

The fact that there was already judicial intervention in this case at one time (when Appellee filed for divorce after the molestation of her daughter by her husband), doesn't mitigate the Constitutional invasion of third person visitation. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Troxel.*

> In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters. *Troxel,* Majority Opinion.

Section 7b (2) of the Child Custody Act defines the term "child custody dispute" as a proceeding where 1) the marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation;

or 2) legal custody is given to a party other than the child's parent or the child is not residing in a parent's home.

While 7b (2) defines "child custody dispute," it does not define "pending." This Court has never ruled on what constitutes a "pending" dispute under the Child Custody Act for purposes of the grandparent visitation statute.

In *Hessbrook v Nazario*, Court of Appeals No. 207350 (unpublished, July 10, 1998), that court found that there was no "pending custody dispute" for purposes of child custody once a judgment has been entered. As analyzed in *Hessbrook*:

> "Although the trial court continued to have jurisdiction over the children until the children reached the age of majority, the initial divorce proceeding concluded with the entry of the judgment of divorce. The initial divorce proceeding did not create an ongoing custody dispute in which the third party could intervene at any time until the youngest child reached the age of majority. Id. at page 2.

The *Hessbrook* court concluded that "rather, any subsequent custody dispute would commence with one of the parents filing a petition for a change of custody." *Id* at page 4, ft. 2. Although unpublished, *Hessbrook* is highly instructive.

In contrast, the Court of Appeals in *Brown v Brown*, 192 Mich App 44, 45, 480 NW2d 292 (1991), found standing for grandparent visitation based on entry of a final divorce judgment resolving custody issues. The rule of *Brown* (final judgment constitutes a "pending" custody dispute) does not logically address the issue of what is actually "pending" before the court. Additionally, in each of the *Brown*-type cases, child custody appears to have been actually in dispute at

some point in the case. *See e.g. Olepa v Olepa*, 151 Mich App 690, 391 NW2d 446 (1986) (pending post-judgment custody dispute where parties had contested custody and appealed earlier custody decision).

In *Derose,* there is no actual pending custody dispute. Indeed, there was never an actual dispute. A default Judgment of Divorce was entered, giving Appellee full physical and legal custody. Appellant's son at the time was in prison for the criminal sexual assault against the child of the marriage.

The fact that litigants are required, at some point, to request Court interaction in their lives (for a divorce, to determine child custody or parenting time) is not an invitation for the Courts to, forever thereafter, review the parent's decisions regarding the best interests of their child and substitute their judgment for that of the parents when they wish to do so. The requirement that the Court have a "pending action" before it prior to making a grand parenting time decision is insufficient to save this statute from Constitutional infirmity due to its over breadth.

4. Other state decisions are consistent with the Court of Appeals decision in this matter.

This Court should review carefully the out of state case law brought to its attention, as many of the rulings are complex[6]. The important consideration is not whether statutes have been found constitutional or unconstitutional (whether facially or as applied), but rather on what substantive standard the courts have applied in construing the various statutes. These decisions have predominantly

[6] The Family Law Section of the State Bar of Michigan regrets that it does not have the resources to perform a thorough review and analysis of all law in this matter from the United States and this analysis should not be considered exhaustive; however, seminal cases are discussed.

approached the issue as a question of the applicable substantive standard used to intervene into a family, and not as an issue of standing or burden of proof.[7]

The cases most often find application of a best interests test alone inadequate to protect the fundamental child-parent liberty interest, and require a fitness test or a showing of harm or some extraordinary circumstance before intervention.

The Illinois Supreme Court held that the state's grandparental visitation statute was facially unconstitutional by placing a parent on an equal footing with a person seeking visitation under a best interest standard and directly contravening the traditional presumption that a ***parent is fit*** and acts in the best interest of the child. *Wickham v. Byrne & Langman v. Langman,* 769 NE2d 1 (2002). Exactly as in Michigan, the Illinois statute allows the Court to consider a "best interests" test when considering grandparent visitation. The Illinois statute

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[7] Even other cases that find statutes acceptable under *Troxel* ostensibly based on specific standing provisions, in reality focus on substantive standards. In *Harrington v. Daum*, No. CA A108204 (Or. Ct. App. Jan. 31, 2001) the Oregon Court of Appeals found that the Oregon statute focuses on whether there is a parent child relationship between the third-party petitioner and the child, implying that there will be harm if that relationship is severed. In general standing provisions like those in Michigan's statute do not address the underlying issue of the state substituting its judgment for that of fit parents.

Likewise. in *State of West Virginia ex rel. Brandon L. and Carol Jo L v Moats*, 551 SE2d 674 (W. Va 2001), ostensibly cited by Appellant as supporting his position, the statute in question contains twelve specific statutory criteria relating to grandparent visitation that go beyond the mere best interests of the child. The statutory criteria include, among others, assessing the relationship between the grandparent and child; the effect of the visitation on the parent-child relationship, whether the visitation request was in good faith, and the preference of the parent. The statute also requires that there is no significant interference in the parent-child relationship. This amounts to a more focused standard than Michigan's best-interest factors – which do not directly pertain to third person visitation issues at all. The West Virginia statute falls short of clear harm required before intervention; harm is at least implied by its focus on avoiding interference with the parent child relationship and some of the listed factors. Michigan's factors fall far short of even this standard.

lists a number of limitations as prerequisites for filing.[8] However, the statute ultimately permits the state to order visitation based on a best interests standard. The court, while noting that Illinois statutes carry a strong presumption of constitutionality, focused on what substantive standard is used as the basis for state interference:

> [The] argument overlooks the clear constitutional directive that state interference should only occur when the health, safety, or welfare of a child is at risk. The issue we address does not involve a threat to the health, safety, or welfare of children. Unlike the statutes concerning inoculation or immunization, sections 607(b)(1) and (b)(3) involve visitation and a parent's decision to control who may interact with his or her children. Additionally, the United States Supreme Court does not limit the fundamental right to make decisions concerning the care, custody, and control of children to decisions made by joint parents: "this Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to `the companionship, care, custody, and management of his or her children' is an important interest that `undeniably warrants deference and, absent a powerful countervailing interest, protection" (Emphasis added).

The Court concluded that:

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[8] Section 607(b) states, in pertinent part:

"(b)(1) The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents or great-grandparents or on behalf of the sibling, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child, and may issue any necessary orders to enforce such visitation privileges. Except as provided in paragraph (2) of this subsection (b), a petition for visitation privileges may be filed under this paragraph (1) * * * if one or more of the following circumstances exist:

(A) the parents are not currently cohabiting on a permanent or an indefinite basis;
(B) one of the parents has been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts;
(C) one of the parents is deceased;
(D) one of the parents joins in the petition with the grandparents, great-grandparents, or sibling; or
(E) a sibling is in State custody.

* * *

(3) When one parent is deceased, the surviving parent shall not interfere with the visitation rights of the grandparents."

> Section 607(b)(1) contains a similar flaw to the statute at issue in Troxel. Section 607(b)(1) permits grandparents, great-grandparents, or the sibling of any minor child visitation *if "the court determines that it is in the best interests and welfare of the child*. ... Like the statute in *Troxel*, section 607(b)(1), in every case, places the parent on equal footing with the party seeking visitation rights. Further, like the statute in *Troxel*, section 607(b)(1) directly contravenes the traditional presumption that parents are fit and act in the best interests of their children. The statute allows the "state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a `better' decision could be made." *Troxel*, 530 U.S. at 72-73, 147 L.Ed.2d at 61, 120 S.Ct. at 2064.
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> Section 607(b)(1) exposes the decision of a fit parent to the unfettered value judgment of a judge and the intrusive micro-managing of the state. Because we can conceive of no set of circumstances under which section 607(b)(1) of the Act would be valid, we hold that it is unconstitutional on its face. For the same reasons, we hold that section 607(b)(3) is facially unconstitutional." (Emphasis added).

The Illinois decision does not rely on allocating burdens of proof or the degree of evidence (such as clear and convincing) as sufficient to protect the fundamental parent-child liberty interest. The court directly equates a "best interests" substantive test with unconstitutional insertion of unfettered value judgments of a trial court. *See Schweigert v. Schweigert*, 772 N.E.2d 229 (2002)(following *Wickham*); *Lulay.*

Similar, Maryland's highest Court held that their grandparent visitation statute (using a "best interests" standard, like Michigan) unconstitutionally violated a mother's due process rights where the grandparents did not allege, and no court had found, that the mother was an unfit parent. *Brice v. Brice*, 754 A.2d 1132 (2000).

Many states have followed this reasoning, which is necessary pursuant to *Troxel.* Arkansas held its grand parenting statute unconstitutionally applied;

"[d]eciding when, under what conditions, and with whom their children may associate is among the most important rights and responsibilities of parents. *Seagrave v Price* 79 S.W.3d 339 (2000). Similarly, the Connecticut Supreme Court reversed a judgment allowing maternal grandmother's and aunt's visitation of father's children, since father was not shown ***unfit***, children were not shown to be harmed by no visitation, and plaintiffs were not parent-like. *Roth v. Weston*, 789 A.2d 431, 259 Conn. 202 (2002).

The *Roth* court also equated best interests with inappropriate substitution of judgment, stating "it allows parental rights to be invaded by judges based solely upon the judge's determination that the child's best interests would be better served if the parent exercised his parental authority differently." 259 Conn. at 223.

> The constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interest at stake, the best interests of the child are secondary to the parents' rights. *Brooks v. Parkerson*, 265 Ga. 189, 194, 454 S.E.2d 769, cert. denied, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995) (finding it "irrelevant" to constitutional analysis that visitation may be in best interest of child); *Rideout v. Riendeau*, supra, 761 A.2d 301 ("something more than the best interest of the child must be at stake in order to establish a compelling state interest"); *In re Herbst*, 971 P.2d 395, 399 (Okla. 1998) (noting that court does not reach best interest analysis without showing of harm; absent harm, no compelling interest); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (holding that best interest of child is not compelling interest warranting state intervention absent showing of harm). Otherwise, "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute." *Rideout v. Riendeau, supra*, 310.
>
> The trial court is not better situated to determine the issue based upon its best judgment. As *Troxel* instructs, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child

> rearing decisions simply because a state judge believes a`better' decision could be made." *Troxel* 72-73. Because parenting remains a protected fundamental right, the due process clause leaves little room for states to override a parent's decision even when that parent's decision is arbitrary and neither serves nor is motivated by the best interests of the child. *Roth* at 224 (emphasis added).

Roth states that the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under General Statutes §§ 46b-120 and 46b-129 — namely, that the child is "neglected, uncared-for or dependent."

Similarly, the Oklahoma Supreme Court held that, in light of *Troxel*, it was error for the trial court to grant grandparent visitation over the objections of the children's parents when there was no showing of harm in the absence of visitation or that the parents were unfit. *Neal v. Lee*, 14 P.3d 547 (2000). Iowa agrees, with its Supreme Court ruling their grandparent visitation statute was unconstitutional where the right of parents to raise their children as they saw fit was a fundamental right, and the statute did not offer a compelling reason to override that right. *Santi v. Santi,* 633 N.W.2d 312 (2001).

California has similarly ruled, finding their statute unconstitutional as it allows insufficient deference to fit parents. *Herbst v Swan*, Court of Appeal, California, Second Appellate District, Division Four, 2002 Cal. App. LEXIS 4736 (Oct. 3, 2002).

Florida's Fifth District Court of Appeal has briefly discussed *Troxel* and accordingly held that Florida's grandparent visitation statute, F.S.A.752.01(1)(b), is facially unconstitutional under the privacy rights protected by Florida's Constitution. *Belair v. Drew*, 776 So. 2d 1105, 1107 (2001). Given the Florida

Supreme Court's previous ruling declaring unconstitutional 752.01(1)(d), concerning grandparent visitation where the minor child is born out of wedlock, *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000), their holding that 752.01(1)(a) allowing grandparent visitation when one or both parents are deceased to be unconstitutional, *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), and declaring facially unconstitutional 752.01(1)(e), concerning grandparent visitation where a minor child is living with both natural parents, *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), this most recent decision is consistent.

The Georgia Supreme Court redefined the best interest of child standard in its third party custody statute as meaning that a third-party had to prove by clear and convincing evidence that a child would suffer harm if custody was awarded to parent. *Clark v. Wade*, 544 S.E.2d 99 (2001), *See also State ex rel. Satchfield v. Guillot,* 820 So.2d 1255 (2002) (grant of specific visitation rights to grandparents was reversed where evidence presented was insufficient to reach statutorily required threshold of "extraordinary circumstances" and trial court substituted its judgment for that of child's parents).

The Massachusetts Supreme Court held that to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the ***child significant harm by adversely affecting the child's health, safety, or welfare***. *Blixt v. Blixt,* 774 N.E.2d 1052 (2002). Similarly, the Kansas Supreme Court held the Kansas statute unconstitutional as applied where statute allowed the court to presume grandparent visitation would be in the best interests of the

child. *Department of Social & Rehabilitation Services v. Paillet*, 16 P.3d 962, 971 (Kan. 2001).

Maine found their statute narrowly tailored and state had compelling interest in providing certain grandparents a forum to seek contact with child for whom they had cared for as parent. *Rideout v. Riendeau,* 761 A.2d 291 (2000) The Maine statute has more stringent requirements than Michigan's and the Maine Supreme Court read their statute narrowly – finding that grandparents must first show that they cared for the child as parents; only then does the act serve a compelling state interest.[9] The Court stated that "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute." *Rideout.*

[9] "We conclude therefore that where the grandparents have acted as the children's parents for significant periods of time, the Grandparents Visitation Act serves a compelling state interest in addressing the children's relationship with the people who have cared for them as parents. Because the Act is narrowly tailored to serve that compelling interest, it may be applied in this case without violating the constitutional rights of the parents." *Id.* at 303. This "standing" requirement is akin to applying a harm standard. Once such a relationship has been proved, the issue of harm become more apparent.

Conclusion

The Court of Appeals in *Derose* concluded that "[i]t is precisely th[e] lack of legislative guidance" that renders the statute constitutionally infirm. Despite the clear *Troxel* requirement that a grandparent visitation statute give "special weight" to a parent's determination of their own child's best interests (*Troxel,* 530 US 57, 67), Michigan's grand parenting provision unconstitutionally puts parents and third persons on equal footing.

Further, and also similar to the Washington statute, Michigan's statute suffers from another Constitutional infirmity: The statute is overbroad because it permits any person to bring a visitation request once the parties have submitted themselves to the jurisdiction of the Court by requesting a divorce, separation or custody determination. MCL 722.27.

It is up to the legislature to craft a narrow grandparent/ third person visitation statute that passes Constitutional scrutiny. Cases involving state intrusion into "perhaps the most fundamental of rights," *Troxel,* are subject to a strict scrutiny analysis and require a compelling state interest. *Santosky*, *Gluckberg.* A generalized interest in grandparent relationships does not amount to the level of a state's compelling interest in ensuring child safety. *See Lulay* (distinguishing state interests). In cases, however, where there is parental unfitness or incapacity to make decisions in the best interest of a child, or some significant showing of harm in the absence of visitation, the State interest may rise to the level necessary to overcome the parent-child liberty interest. Such a

stringent standard ultimately focuses on the fundamental needs of the child, and prevents unnecessary litigation.

The ultimate issue in this matter is when the Constitution permits the state to reach into our homes, and review the decisions that fit parents make regarding what they determine is in their child's best interests. The U.S. Supreme Court has instructed us that the right to raise our children free of governmental intrusion is perhaps "the most fundamental" of rights protected by the Constitution; that requires a high level of scrutiny prior to Court involvement.

The only compelling interest that may justify an intrusion into the protected realm of the parent-child relationship is evidence of unfitness, or perhaps actual harm to a child. Decisions in family law cases almost always involve the very subjective and comparative. Without a parental presumption of constitutional weight, bias and subjectivity become the rule. A finding of unfitness is the appropriate counterweight to the presumption. While there is always some subjectivity in a fitness standard, its more "objective" (not comparative) approach protects the fundamental right recognized in *Troxel*.

Given the Court's requirement to assume that fit parents act in the best interests of their children, Michigan's current grandparent visitation statute must fail as unconstitutional. It is overbroad, allowing any person to request visitation once the family has requested court involvement for divorce, separation or custody (even if that involvement was years in the past). It ignores fundamental Constitutional rights shared by the parent and child by placing their rights on the same level as the third parties, protected only by subjective best-interests

standards (which by their nature require a court to substitute its judgment for that of the parent) and moderate evidentiary standard, the "clear and convincing" standard.

The state should not micromanage families, even families who requested court involvement at some point for a tangentially related issue. The state should not substitute its judgment for that of a fit parent. The Michigan grandparent visitation statute should be held facially unconstitutional.

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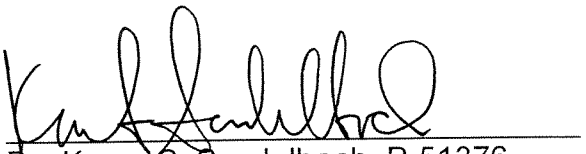
State Bar of Michigan Amicus Curiae Brief



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